STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v MICHAEL SCOTT APGAR, Defendant-Appellant.	FOR PUBLICATION November 9, 2004 9:05 a.m. No. 247544 Wayne Circuit Court LC No. 02-012129-01 Official Reported Version

Before: Murphy, P.J., and O'Connell and Gage, JJ.

GAGE, J.

Defendant appeals as of right his jury trial conviction of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a) (sexual penetration with a person at least thirteen years of age and under sixteen years of age). The trial court sentenced defendant to fifty months to fifteen years in prison. We affirm.

I. Facts and Procedure

The victim in this case is a thirteen-year-old girl. Defendant lived with the family of the victim's friend in Dearborn. At her friend's house, the victim willingly got into a car alone with defendant and his two friends because they invited her to go to "the store" with them. The victim testified that they drove around for several hours while she was forced to smoke marijuana because a sharp knife-like object was pressed against her neck. They arrived at a home in Hamtramck. The victim did not attempt to escape because she did not know her whereabouts.

Defendant took the victim into an empty bedroom where they engaged in sexual intercourse. The victim testified that defendant had placed the knife-like object to her throat and threatened to kill her if she did not do as he said. The victim claimed in addition that both of defendant's friends forced her to perform oral sex by threatening her with the same knife-life object. The victim also alleged that one of defendant's friends burned a homemade tattoo onto her chest before forcing her to perform oral sex. The victim was dropped off at or near her home after midnight, and she told her grandmother that she had been raped.

At the hospital, the victim underwent an examination, and a rape test was administered. The victim sustained a small bruise to her right buttock and irritation and redness to her vaginal opening, which was consistent with forcible sexual assault. The victim's vaginal area tested positive for semen, and a DNA test revealed that it matched defendant's types. From the carpet

in the bedroom of the Hamtramck house, the police recovered three semen stains that matched the DNA types of defendant and his two friends.

Defendant was originally charged with one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(e) (person armed with a weapon or an object that the victim believes is a weapon), and one count of CSC I, MCL 750.520b(1)(d) [ii] (person is aided or abetted by one or more other persons and uses force or coercion to accomplish the sexual penetration). After the jury was selected, the prosecutor orally moved to amend the felony information to include a charge of CSC III, MCL 750.520d(1)(a). The prosecutor argued that it was necessary to amend the felony information under *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), because CSC III under MCL 750.520d(1)(a) is not a necessarily lesser included offense of CSC I under either MCL 750.520b(1)(d) or (1)(e). The trial court denied the prosecutor's request to amend the information as follows:

> *The Court:* . . . I am not amending any information two minutes before we swear the jury in.
>
> So, I mean, that's the ruling.
>
> It's latches, or whatever you want to call it, you guys [the prosecution] had a full opportunity, not you, but anybody in your office had an opportunity to do this at an earlier time.
>
> The defense is here, ready to go to trial.
>
> Your motion to amend the information is denied.
>
> Okay?
>
> *The Prosecutor:* But the Court is willing to give the lesser. There's no—
>
> *The Court:* Well, the lessers [sic] is something different, you know.
>
> But I'm not amending anything.

Over defense counsel's objection, the trial court subsequently provided a jury instruction on CSC III, and the jury convicted defendant on that charge.

II. Amending Felony Information

Defendant first argues that the trial court erred by permitting the prosecution to amend the felony information to include a charge of CSC III and providing the corresponding jury instruction. Because the trial court actually denied the prosecution's request to amend the information, we find that defendant has framed the issue incorrectly. Rather, the question is whether the trial court erred in instructing the jury on CSC III as a necessarily included lesser offense of CSC I as charged. We review de novo claims of instructional error and determinations whether an offense is a necessarily included lesser offense. *People v Mendoza*,

468 Mich 527, 531; 664 NW2d 685 (2003); *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003).

MCL 768.32(1) provides:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

MCL 768.32(1) "only permits instructions on necessarily included lesser offenses, not cognate lesser offenses." *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); *Cornell, supra* at 356. A necessarily included lesser offense is an offense in which all its elements are included in the elements of the greater offense such that it would be impossible to commit the greater offense without first having committed the lesser offense. *Mendoza, supra* at 532; *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). A cognate lesser offense shares several of the same elements and same class or category as the greater offense but contains some elements distinct from the greater offense. *Mendoza, supra* at 532 n 4; *Bearss, supra* at 627. A requested instruction on a necessarily included lesser offense is appropriate "if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Cornell, supra* at 357. The *Cornell* Court concluded that, pursuant to MCL 768.32, instructions on cognate lesser offenses are impermissible because they do not provide a defendant with adequate notice that he might be charged with the lesser offense. *Cornell, supra* at 353-355, 359; *Bearss, supra* at 628-629.

Defendant was charged with one count of CSC I perpetuated by one who is armed with a weapon or an instrument that the victim reasonably believes is a weapon, and a second count of CSC I perpetuated by one who is aided or abetted by one or more other persons, and the offender uses force or coercion to accomplish the act of sexual penetration. MCL 750.520b(1)(d) [ii], (e). The jury convicted defendant of CSC III, sexual penetration of another person at least thirteen years of age and under the age of sixteen, MCL 750.520d(1)(a). Neither of the charged counts of CSC I includes the element of the victim's age. Thus, it is possible to commit CSC I under MCL 750.520b(1)(d) or (1)(e) without committing the uncharged offense of CSC III, MCL 750.520d(1)(a). Accordingly, under *Cornell* CSC III, MCL 750.520d(1)(a), is not a necessarily included lesser offense of CSC I, MCL 750.520b(1)(d) or (1)(e). Because both offenses require the act of sexual penetration and are of the same category of crimes, CSC III is a cognate lesser offense of CSC I as applied to this case. Although defendant was convicted of an uncharged crime, we conclude that defendant was not deprived of due process because all the elements of the uncharged crime were proved at the preliminary examination and trial without objection, providing defendant adequate notice. *Cornell, supra* at 353-355; *Bearss, supra* at 628-629; *People v Hunt*, 442 Mich 359, 362; 501 NW2d 151 (1993).

The right to a preliminary examination is a statutory, not constitutional, requirement. *Hunt, supra* at 362. The defendant in *Hunt* was charged with gross indecency between males, and, after the preliminary examination, the prosecutor sought to amend the felony information to

charge second-degree criminal sexual conduct (CSC II). The Court considered that the complaining witness's testimony at the preliminary examination met the prosecutor's burden and supported the greater charge. *Id.* at 364. The Court concluded that the elements of both offenses had been shown, and the defendant did not suggest anything that his attorney would have done differently if the defendant had originally been charged with CSC II. Because the defendant was not prejudiced by unfair surprise, inadequate notice, or insufficient opportunity to defend against the accusations, the Court concluded that it was proper to remand for amendment of the information to charge CSC II.

Like the situation in *Hunt*, the victim's testimony at preliminary examination and trial supports a CSC III charge because she testified about her age and the sexual encounter with defendant. Defendant was not prejudiced by unfair surprise, and defendant had adequate notice that he might be charged with CSC III. It is clear under *Hunt* that defendant may be tried on the CSC III charge without a preliminary examination. Moreover, CSC III is part of the same statutory scheme and was unquestionably drafted as a lesser or inferior offense to the charged crime. We conclude that defendant's due process rights are not implicated by the CSC III jury instruction because all elements were proven, and such evidence was admitted without objection. In this respect, we distinguish *Cornell* because of the unique facts presented. CSC III, MCL 750.520d(1)(a), is a strict liability offense, *People v Cash*, 419 Mich 230, 242; 351 NW2d 822 (1984), and defendant has not been denied the opportunity to defend against the accusations.

III. Sentencing

Defendant also alleges several errors in the trial court's scoring of the offense variables of the sentencing guidelines. We review a trial court's scoring decision for an abuse of discretion to determine whether the evidence adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant first challenges the scoring of offense variable (OV) 3 at five points for bodily injury to the victim not requiring medical treatment. MCL 777.33(1)(e). There was medical evidence that the victim received a homemade tattoo and sustained a small bruise to her right buttock and irritation and redness to her vaginal opening. Regardless of whether the jury believed that the sexual intercourse was forced or consensual, there was sufficient evidence of injury to support the trial court's decision to score OV 3 at five points.

Defendant next challenges the scoring of OV 4 at ten points for serious psychological injury to the victim that "*may* require professional treatment." MCL 777.34(2) (emphasis added). There is no requirement that the victim actually receive psychological treatment. Because the victim testified that she was fearful during the encounter with defendant, we find that the evidence presented was sufficient to support the trial court's decision to score OV 4 at ten points.

Defendant challenges the scoring of OV 8 at fifteen points for transporting the victim to another place or situation of greater danger or holding the victim captive beyond the time necessary to commit the offense. MCL 777.38(1)(a). Although the jury found that there was no use of force, the victim was transported from her friend's house in Dearborn to an unfamiliar house in Hamtramck, where she was involved in sexual encounters with three men she barely

knew. We conclude that this evidence supported the trial court's scoring of OV 8 at fifteen points.

Defendant also challenges the scoring of OV 10 at fifteen points for predatory conduct, asserting that sexual contact with an underage person always involves the victim's vulnerability. MCL 777.40(1)(a). Both the timing and the location of an assault are factors of predatory conduct before the offense, which conduct includes watching a victim and waiting for any chance to be alone with her at a separate location. *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003). The victim testified that, although defendant and his two friends invited the victim to accompany them to the store, they drove around for at least two hours, forcing the victim to smoke marijuana. Moreover, the victim claimed that defendant led her to an unfurnished bedroom in the Hamtramck house, shut the door, and forced her to smoke more marijuana before engaging in sexual contact. We therefore conclude that there was sufficient evidence to support the trial court's scoring of OV 10 at fifteen points.

Finally, defendant challenges the scoring of OV 14 at ten points for defendant's role as a leader in a multiple offender situation. MCL 777.44(1)(a). We view the entire criminal episode when determining if an offender was a leader in a multiple offender situation. MCL 777.44(2)(a); *People v Johnson*, 202 Mich App 281, 289-290; 508 NW2d 509 (1993). Defendant was the first to have sexual contact with the victim, and he had the most sexual contact with her. He was the oldest of the offenders, and only his DNA types matched the semen found in the victim's vaginal area. Although defendant was not the one driving the vehicle, we conclude that there was sufficient evidence that he led the group in the sexual contact. Therefore, the trial court's scoring of OV 14 at ten points was proper. Because there was adequate evidence to support the trial court's calculation of each of the challenged offense variables, we conclude that the trial court did not abuse its discretion and defendant is not entitled to resentencing.

Affirmed.

/s/ Hilda R. Gage